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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1931

No. 84

W. L. MATTHEWS, ET. AL.,
Appellants

vs.

J. F. RODGERS, ET. AL.,
Appellees

BRIEF FOR APPELLEES

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BRIEF FOR APPELLEES

STATEMENT OF FACTS ON THE MERITS.

I.

Appellants and Appellees entered into an agreed statement of the evidence. (Record Pages 28-42.)

The agreed stipulation, Paragraph II. thereof provides:

> "Except for the conclusions of law, which are denied by the answer filed herein, all of the facts stated in said Bill of Complaint are specifically admitted, except as the said report, of the said Joseph F. Ellis, should evidence the contrary." (Record Page 29.)

Attached as a part of the stipulation is the report of one Joseph F. Ellis, Certified Public Accountant, who

was mutually selected by all parties to audit the books of certain of the appellees, for the purpose of reflecting in said report the facts of the course of business of each of the appellees; it was agreed that the facts so reflected should be taken and considered as typical of the facts with reference to the course of business of each of said appellees.

II.

The established facts, therefore, are as follows:

The appellees are actively engaged in purchasing, selling and shipping cotton upon the market for cotton, which is now and has been for many years in the past maintained in the City of Clarksdale, Mississippi, as well as other Mississippi Delta cities and towns. (Record Page 3.)

Long Staple Delta Type cotton is practically the only product of the farms or plantations of the Delta section of the State of Mississippi, the annual crop approximating 700,000 bales of this peculiar kind and type of cotton; each bale being of the average weight of 500 pounds. The soil and climate of the said Mississippi Delta is peculiarly adapted to the growing of this peculiarly fine type and grade of cotton. None of this cotton is used or consumed locally, or within the State of Mississippi. All of the crop raised in the Delta of Mississippi, purchased by Cotton Buyers of the class of appellees herein, is purchased for shipment and actually shipped to terminal markets outside of the State of Mississippi.

When the cotton crop is harvested by picking, ginning and baling it at cotton gins, practically all of the cotton is delivered to warehouses and there stored, pending sale and shipment. Samples of said cotton are placed on the tables of Cotton Factors or Cooperative Associations, at which places, practically all of the sales are made.

The warehouses receive the bales of cotton from the producers, and after the cotton has been sold, compress the cotton to approximately one-third of its size, preparatory to loading and shipping it by rail to the terminal markets, on orders from the Cotton Buyers or the consumers. Loading of the cotton for shipment proceeds as rapidly as the consumer at the terminal market can receive the shipment. When loaded for delivery the cotton is sent promptly to the terminal market and is there either resold to the consumer, or delivered direct to the mill. In each instance, the cotton so purchased and shipped is for delivery and actually shipped to foreign markets, wholly without the State of Mississippi.

By general and uniform custom, bales of cotton are transported to compresses from the gin by rail, trucks or wagons. A compress is a combination storehouse and plant, equipped with machinery designed to compress bales of cotton under extremely high pressure, for the purpose of reducing their size. After compression a bale is approximately 18 inches thick. The purpose of compression is that the railroads and carriers by water, in interstate and foreign commerce, are thereby enabled to load into cars and ships for carriage approximately three times as much cotton, as otherwise would be possible.

At Clarksdale, there are two compresses owned and operated by a corporation existing under the Laws of the State of Delaware, to-wit: The Federal Compress & Warehouse Company. Said Federal Compress and Warehouse Company has, with reference to both and each of said compresses maintained at Clarksdale, complied with all of the terms and provisions of an act of Congress, the short title of which is the "United States Warehouse Act," being Chapter 10, Title 7, U. S. C. A. The said

Federal Compress and Warehouse Company complied with the terms and provisions of the said "United States Warehouse Act" for the reason that all of said cotton stored in the said compresses and/or warehouses at Clarksdale, Mississippi, and handled in the manner above described was and is cotton stored and handled therein for interstate and/or foreign commerce, and the power of Congress to affect, by provisions of its said act, the said cotton so handled and stored arises only from the fact, that said cotton and all of it is stored and handled for interstate and foreign commerce.

When cotton is delivered to said compresses, the said Federal Compress & Warehouse Company issues to the owner thereof warehouse receipts, which receipts comply in all things with the terms and provisions of said Act of Congress. Said cotton is universally sold upon the market by transfer and delivery of said warehouse receipts in accordance with the terms of said Act of Congress, and actual samples taken from said bales of cotton; said warehouse receipts being the evidence of the ownership of such cotton.

At Clarksdale, there exists an active market for the purchase and sale of said cotton between farmers raising said cotton and appellees and others engaged in like business, who are purchasing the same with the intention and purpose of selling and transporting same in interstate and foreign commerce, which is and was and has been a universal custom and course of business for more than twenty years past. The price at which said cotton is sold upon said market at Clarksdale is determined by the value of such cotton upon certain cotton exchanges, maintained, respectively, in the Cities of New Orleans, Louisiana, Chicago, Illinois and New York, New York; and there are maintained, in the City of Clarksdale,

Mississippi, offices of brokers who receive daily by wire quotations from such exchanges which fix and determine the price at which cotton is sold upon said Clarksdale market. All of said cotton, however, is bought by appellees with the uniform purpose and intention (which is and has been the universal course of business) to transport the same in interstate and foreign commerce to the mills located in the states upon the Atlantic seaboard, to-wit: Georgia, South Carolina, North Carolina, and Tennessee; and the mills of the New England States, to-wit: Massachusetts, Rhode Island, and Connecticut; and the mills of foreign countries. None of said cotton is spun or utilized within the confines of the State of Mississippi, or sold to or purchased by any consumer within the confines of the State of Mississippi.

Approximately seventy-five per cent of said cotton is delivered by rail to said compresses at Clarksdale, and upon delivery of such cotton to the said carrier by rail at points outlying said City of Clarksdale, said cotton thereupon is placed in and thereafter remains in the channels of interstate commerce. The said carrier transports by rail the said cotton to the compress at Clarksdale, and it is there concentrated merely for the purpose of compression and for the purpose of awaiting the determination of its final point of destination outside the State of Mississippi. When the destination of such cotton is determined, the carrier loads the same out on instructions of the then owner, after having the cotton compressed, and charges the through freight-rate from the point of origin within the State of Mississippi to the point of destination outside of the State of Mississippi, instead of charging the combination rate for carriage in intrastate commerce from the point of origin to Clarksdale, plus the charge for carriage in interstate commerce from Clarksdale to the point of destination. As for in-

stance: the rate for the carriage in intrastate commerce from Sumner, Mississippi, to Clarksdale, Mississippi, a distance of approximately twenty-five miles, of an uncompressed bale of cotton is $1.28 per hundred pounds. The through rate for the carriage of a compressed bale of cotton from Clarksdale, Mississippi, to Fall River, Massachusetts, is $1.28 per hundred pounds. The said carrier, instead of charging the combination rate above outlined for carriage from Sumner, Mississippi, to Fall River, Massachusetts, charges the through rate, which is the intermediate rate, as if there had been no interruption of shipment from Sumner, Mississippi, to Fall River, Massachusetts. The said charges are made by said carriers in accordance with the regulations prescribed by the Interstate Commerce Commission in pursuance of the Act of Congress creating said Commission and the several amendments thereto.

The general and uniform custom and course of business in handling said cotton upon said market is had and done in the following manner:

The farmer causes warehouse receipts, when the cotton is delivered to the compress, to be issued and delivered either directly to himself or his agent, commonly called a cotton factor. Upon the Clarksdale market, there are approximately twenty-five buyers and shippers who are engaged in the sole business of buying, selling, and shipping cotton in interstate and foreign commerce. The farmer or the factor causes the actual bales of cotton to be sampled, and the cotton is sold to the appellees and other buyers, sellers, and shippers upon said market, upon the basis disclosed by the character of the samples of said cotton, and by endorsement and delivery of the said cotton receipts evidencing the ownership of the same, the price therefor being governed by the markets

in New York, Chicago, and New Orleans. It is uniformly known and understood by the farmer, cotton factor, and the buyer that the buyer is purchasing said cotton solely for the purpose of causing the same to be transported by rail and/or water to said points in the United States and foreign countries where mills convert said cotton into textile products. No cotton that is bought and/or sold upon the Clarksdale market is utilized in the State of Mississippi, but all of said cotton is transported for consumption in interstate and foreign commerce.

The general and uniform custom among buyers, shipper and sellers, as well as the general course of business, is that a buyer enters into a contract for either the future or immediate delivery of a certain number of bales of cotton of a certain grade, class and staple, obligating himself by such contract to deliver to a mill in a foreign state or country such cotton at a given price. Thereupon, such buyer will go upon the market at Clarksdale, and purchase cotton of the kind and character which he is obligated to his customer to deliver, and will cause the delivery of said cotton in interstate and/or foreign commerce in accordance with the terms of his contract. A very small proportion of the cotton purchased by shippers, and cotton buyers (not exceeding ten per cent) is bought when no contract for the sale thereof exists. In such cases, it is bought with the sole anticipation and intention on the part of the buyer (which intention is fully known both to the farmer, buyer and/or factor) to procure a sale of said cotton to some foreign cotton mill or foreign cotton merchant, and to cause the same to be transported in interstate and/or foreign commerce, at such time as market conditions will justify. Appellees have engaged in the business of buying and selling cotton in this manner, upon the markets hereinabove described, for periods ranging from five to more than twenty years.

The business of appellees is commonly known as that either of a cotton buyer, cotton shipper, or words of like import.

In order to acquire a successful business as a cotton buyer, one is first required to spend from three to five years, practically without compensation, in perfecting himself in the knowledge of the various classes, grades, and staples of cotton; likewise, in order to acquire a successful business as a cotton buyer, it is necessary for one to establish what is commonly known in the trade as connections in the various terminal markets where cotton is converted into textile products, as aforesaid. These connections refer to customers; that is, either mills or cotton merchants in foreign terminal markets, who habitually do business with a given buyer or shipper. It is a matter of extreme difficulty for one to establish such connections, and an established business as a cotton buyer is measured, as to value, by the amount of cotton, which such buyer is able to sell through the connections, which he has established by his attention to his business. Appellees are each and all established cotton buyers and shippers engaged in the said business, having established outlets and connections for the ultimate sale and consumption of cotton purchased by them upon the market aforesaid. The business of each individual appellee herein necessarily varies, but the annual business of the appellees herein range from five thousand bales to twenty-five thousand bales each. A reasonable profit for a cotton buyer, in buying and reselling a bale of cotton upon said market in the manner aforesaid, is not less than $2.50 per bale.

This method of purchasing, shipping and selling is the universal course of business in the cotton trade of appellees and others similarly situated.

The above statement substantially reflects the allegations of fact alleged in the Bill of Complaint and agreed to be the facts governing the case, as reflected by the stipulation of counsel, at Page 29 of the Record, except as the report of Joseph F. Ellis, Certified Public Accountant, should evidence the contrary.

STATEMENT OF REPORT OF JOSEPH F. ELLIS

I.

This report in no wise contradicts or modifies the facts stated in the Bill of Complaint, as above related; but merely reflects the exact course of business of the appellees and varies only from the allegations of the Bill of Complaint in that it reflects that in the course of business of H. J. Murff Cotton Company, all of the cotton purchased by this firm, consisting of 15,173 bales of cotton of the value of $1,874,004.85, was actually purchased and shipped out of the State of Mississippi to foreign countries and foreign states on orders of foreign brokers or consumers, against which the cotton was purchased; the only exception being that of the total number of bales thus purchased, during the fiscal year ending August 31, 1930, 278 bales of the value of $34,335.50 were disposed of locally, which latter number of bales consisted of 1.84 per cent of the entire business of H. J. Murff Cotton Company. (Record Pages 31-32.)

The report likewise reflects that the 278 bales sold locally were disposed of to other cotton buyers, for the reason that this cotton was not deliverable on contracts had by H. J. Murff & Company, and for which H. J. Murff & Company had no use whatever. These bales

constituted what is known in the cotton trade as "Overs." (Record Page 34.)

These "Overs" constitute that small proportion of cotton which is bought in lots and which is left on the hands of the cotton buyer, which do not "come up" to the type, grade or staple deliverable on contracts.

The report of Ellis also shows that all of the cotton so purchased is ultimately shipped out of the State of Mississippi to customers of appellees, on such dates as called for by the contracts against which the cotton is purchased, and only is stored temporarily in the Federal Compress & Warehouse Company, to await shipment in conformity with such contracts.

Ellis' report likewise discloses the same course of business in the case of B. F. Oliver & Company, the other of appellees audited, except that owing to an exceptional season, beginning in 1930 up to the date of the filing of the report, approximately 10 per cent of the purchases of B. F. Oliver & Company constituted "Overs," or cotton which did not fit contracts, and which was disposed of locally to other Cotton Buyers. (Record Pages 36-38.)

The matter of "Overs" disposed of, as an incident to the business of appelles, is fully explained by Ellis' report on Pages 38 through 39 of the record.

POINT I.

DOES THE MATTER IN CONTROVERSY IN THIS CASE EXCEED THE SUM OR VALUE OF THREE THOUSAND DOLLARS?

We first direct our attention to the above question in view of the rule of this court that the question of its jurisdiction and of the jurisdiction of the court below

is always the first matter inquired into. Counsel for appellants, in support of the negative of the question, cite a number of cases from this court which in substance establish beyond controversy the following well-recognized and undisputed propositions:

1. In a suit to enjoin the collection of a tax, usually an ad valorem tax, the amount of the tax is determinative of the amount or value in controversy.

2. In a suit by one plaintiff as against several distinct taxing officers or districts whose duties are not related and against whom a joint suit for the recovery of the taxes would not lie, the amount of the taxes may not be added together in order to attain the necessary jurisdictional amount.

3. In a suit by several plaintiffs against one or more defendants whose interests are not joint, the amount of tax claimed or asserted as against each separate plaintiff is determinative of the question of the amount in controversy.

We fully recognize all of the rules above stated, and were fully appreciative of these rules at the time of the filing of the bill in the present case. Manifestly, if the amount of tax, to-wit: One Hundred ($100.00) Dollars, as against each of the appellees, is to be taken as determinative of the amount in controversy, the court below was without jurisdiction. Such, however, we respectfully submit is not the rule to be applied to the peculiar facts of the case at Bar.

Before adverting to the authorities which we shall insist fully sustain the jurisdiction of the court below, we desire to impress upon the court the following facts alleged in the original bill and admitted by agreed statement of evidence (R. 28).

1. The matter in controversy exceeds the value of Three Thousand ($3,000.00) Dollars (R. 2).

2. The appellants were threatening, at the time of the filing of the bill, to deprive appellees of the right to earn their livelihoods, which right was of the value of more than Three Thousand ($3,000.00) Dollars (R. 3).

3. The provisions of Chapter 88 of the Laws of the State of Mississippi of 1930 (see appendix to appellants' brief and this brief) required appellees to make application in writing to appellant Matthews for a privilege license to engage in the business of cotton buyer; required of appellees, as a condition precedent to engaging in such business, both the making of the application and the payment of a privilege tax of One Hundred ($100.00) Dollars. (R. 10).

4. Said statute provides, in the event of the failure on the part of appellees to make such application and pay such tax, for criminal prosecution whereby each of appellees might be punished by fine of not more than Five Hundred ($500.00) Dollars and/or imprisonment in jail for not exceeding six (6) months (R. 10).

5. Said statute also provides that, in the event of the failure of appellees to pay the privilege license above referred to before October 1st, 1930, a penalty of Two Hundred ($200.00) Dollars be imposed for each day that appellees might engage in such business (R. 10).

6. Said statute likewise provides for the payment by each of the appellees of Twenty-Five ($25.00) Dollars on or before October 1st, 1930, for each employee employed by them as a buyer or seller of cotton, with like penalties in the event of the failure to pay the last mentioned tax (R. 11).

7. The appellants, at the time of the institution of this suit, were threatening appellees with the en-

forcement of each of the above mentioned provisions of the Act, and in addition thereto, were threatening the issuance of warrants of distress, and threatening to levy such warrants of distress upon the real and personal property of each of the appellees (R. 11-12).

8. In the event of appellants' carrying out the threats above described, the business of each of the appellees would be seriously impaired if not destroyed; that a loss or suspension of the business of each of them for a period of thirty days would cause great damage, and that in any event, each of the appellees would be damaged in excess of Three Thousand ($3,000.00) Dollars (R. 15).

9. The active business period of the appellees begins about September 1st of each year, and extends through March 1st of the succeeding year (R. 15).

We make the assertion that each of the foregoing facts are both alleged and admitted. We rely upon the admission contained in the agreed statement of evidence (R. 28), for the reason that in such agreed statement, it is agreed that all facts stated in the bill of complaint are true unless the report of Jos. F Ellis, heretofore referred to, should evidence the contrary. The report of Mr. Ellis has no tendency to contradict any one of the foregoing facts, but on the contrary, in many particulars substantiates such facts.

With these admitted facts in mind, it is the contention of appellees that the true matter in controversy in this cause is not the amount of the tax, but the right of appellees to engage in business free from the interference prescribed by the above mentioned Chapter 88 of the Laws of 1930.

We now turn to the authorities substantiating this proposition:

27 *R. C. L.*, 32:

"34. IN GENERAL.—Where jurisdiction is dependent on the amount in controversy the substantial character of the jurisdictional averment in the bill is to be tested, not by the mere immediate pecuniary damage resulting from the acts complained of, but by the value of the subject matter to be protected and the rights of property which the complainant seeks to have recognized and enforced. This principle has been applied in suits for an injunction to restrain a nuisance, a continuing trespass, or the like, it being the rule that the jurisdictional amount is to be tested by the value of the object to be gained by the complaint. So where the value of a contract right to perpetual exemption from taxation exceeds the jurisdictional amount, the fact that the particular tax assessed and levied is less than the required amount is not controlling. And where the matter in dispute is alleged to be in excess of the sum required, jurisdiction is not terminated by ex parte affidavits denying that the property is of the value alleged, unless this fact is made to appear to the satisfaction of the court. Nor can a suit properly be dismissed as not involving a controversy of an amount sufficient to come within the court's jurisdiction, unless the facts, when made to appear on the record, create a legal certainty of that conclusion. Furthermore it is decided that an apparent defect of jurisdiction dependent on an inquiry into facts which might or might not show a matter in controversy of sufficient pecuniary value cannot be availed of except by appeal or writ of error, and does not render the judgment or decree of the court a nullity. The limitation, however, as to the amount necessary to confer jurisdiction has been held not to apply to suits in which the United States is plaintiff or petitioner."

Berryman v. Whitman College, 222 U. S. 334. This case was a suit by Whitman College, instituted in the Circuit Court of the State of Washington, to enjoin the collection of taxes amounting to $946.32 on the ground that the levy of the taxes constituted the impairment of a contractual obligation whereby the State of Washington had undertaken to give to the college perpetual exemption from taxes levied by the State. Attack was made on the jurisdiction of the court on the ground that the jurisdictional amount was not involved. We quote in part from the opinion of the court by White, Chief Justice:

> "The taxing officers of the county of Walla Walla, the defendants below and appellants here, insist that we may not review the merits, because the court below had no jurisdiction over the cause, and therefore we must reverse and remand, with directions to dismiss the bill. This rests upon the proposition that, as the tax was below the jurisdictional amount, it afforded no basis for jurisdiction. The sum of the levied tax, it is urged, could not be increased by considering the power of taxation which might be exerted in other taxing districts, or by adding taxes which, if the right to tax existed, might be assessed and levied in future years. This, it is insisted, is not only sustained by reason, but is sanctioned by prior decisions of this court.
>
> "Both assumptions are wrong. The first, because it misconceives the character of the relief prayed, which was the enforcement of a contract exemption during the perpetual life of the corporation, and as broad as its power to acquire and hold property.
>
> "Considering the averments of the bill, the amount and value of the property of the corporation, and the nature and character of the contract of exemption asserted, it cannot be doubted that the value of the thing in issue, the contract right, exceeded in value the jurisdictional amount. Granting that the un-

certainties of the future and the shifting ownership of property forbids, in a contest merely over the validity of a tax, adding the sum of future taxes which might be levied to the amount of taxes actually levied for the purpose of jurisdiction, that principle can have no application to a case where the issue presented is not only the right to collect, but also to levy all future taxes. The admission that the right to tax may be abridged by contract, and that such contract may not be impaired without violating the Constitution, carries with it of necessity the power and the duty to protect the contract right, and in the nature of things causes jurisdiction for such purpose to be measured by the value of the right to be protected, and not by the value of some mere isolated element of that right. And the doctrine just cited has been applied in two cases so obviously in principle like this as practically to foreclose the question. * * *

"We state in the margin the cases principally relied upon to support the contention as to the want of jurisdiction. It would suffice to say of these cases that if they supported the proposition which they are cited to maintain, they have been qualified and restricted by the cases which we have just reviewed. But such result is uncalled for, as an analysis of the case will show that all of them considered, in the absence of contract, where the right to levy a particular tax was assailed, whether there was authority to make up the jurisdictional amount required, by calling into the consideration the influence which the judgment might have upon different taxes the power to take in view future illegal taxes, upon the theory that they might be levied." (The cases placed in the margin by the court are those headed by *Holt v. Indiana Mfg. Co.*, 176 U. S. 68.)

It is thus apparent that, in *Berryman v. Whitman College*, supra, the suit was one primarily to protect the contractual right to exemption from ad valorem taxes,

and secondarily to enjoin the present collection of a tax of less than $1,000.00. The present case is one seeking, as we submit, to protect the constitutional right of engaging in interstate commerce free from a burden placed thereon by the state. We submit that there is no difference in principle in the two rights and in determining the true matter in controversy.

Hunt v. New York Cotton Exchange, 205 U. S. 322, is an oft-cited case on the question of the amount in controversy. In that case, the New York Stock Exchange sought to enjoin one Hunt from receiving and using quotations made upon the exchange. The amount in controversy was determined to be not $300.00 per annum which the defendant paid for receiving them from the telegraph company, but the value to the exchange of the right to control the distribution of its quotations, and, as that exceeded $3,000.00, the jurisdiction was sustained.

> "In other words, the object of the suit is to keep the control of the quotations by the exchange and its protection from the competition of bucket shops or the identity of its business with that of bucket shops. And the right to the quotations was declared, as we said in Board of Trade v. Christie Grain & Stock Co., to be property, and the exchange may keep them to itself or communicate them to others. The object of this suit is to protect that right. The right, therefore, is the matter in dispute, and its value to the exchange determines the jurisdiction, not the rate paid by appellant to the telegraph company. The value of the right was testified to be much greater than $3,000. In Mississippi & M. R. Co. v. Ward, 2 Black, 485, it was decided that jurisdiction is tested by the value of the object to be gained by the bill. To the same effect is Board of Trade v. Cella Commission Co., 145 Fed. 28. In the latter suit the Chicago Board of Trade obtained

> a decree restraining the use of its continuous quotations by the Cella Commission Company. It was said that the amount or value of such right is not the sum a complainant might recover in an action at law for the damage already sustained, nor is he required to wait until it reaches the jurisdictional amount. The latter declaration is supported by Scott v. Donald, 165 U. S. 107."

The same doctrine is supported by *Butterman v. Louisville etc. Railroad Co.*, 207 U. S. 205; *Brown v. Trousdale*, 138 U. S. 389.

Packard v. Banton, 264 U. S. 140, was a suit instituted to enjoin the enforcement of a statute of the State of New York which required the plaintiff, as an operator of motor vehicles for hire, to file with the State Tax Commission a bond made by a surety company, conditioned for the payment of a judgment, in the event of recovery against the operator by any person because of negligence or defective construction of the vehicle. The statute was attacked on the ground that it was in contravention of the equal protection of the laws and the due process clause of the 14th Amendment.

Objection was made that the requisite jurisdictional amount was not involved for the reason that the amount necessary to satisfy the bond, according to the statement of the plaintiff, amounted to only $960.00. It was alleged that the necessity of paying the premium on the bond reduced the net income of each taxi-cab by some $18.50 per week. Plaintiff operated four taxi-cabs.

> "1. Appellees insist that the district court was without jurisdiction because the matter in controversy does not exceed the value of $3,000. Judicial Code, Sec. 24, subd. 1. The bill discloses that the enforcement of the statute, sought to be enjoined,

will have the effect of materially increasing appellant's expenditures, as well as causing injury to him in other respects. The allegations, in general terms, are that the sum or value in controversy exceeds $3,000, which the affidavits filed in the lower court tend to support; that appellant is the owner of four motor vehicles, the income from which would be reduced, if the law be enforced, to the extent of $18.50 each per week; and that his business would otherwise suffer. The object of the suit is to enjoin the enforcement of the statute, and it is the value of this object thus sought to be gained that determines the amount in dispute. Mississippi & M. R. Co. v. Ward, 2 Black, 485; Texas & P. R. Co. v. Kuteman, 54 Fed. 547, 552; Nashville, C. & St. L. R. Co. v. McConnell, 82 Fed. 65, 73; Scott v. Donald, 165 U. S. 107, 114; Hutchinson v. Beckham, 118 Fed. 399, 402; Evenson v. Spaulding, 150 Fed. 517, 520; Hunt v. New York Cotton Exch. 205 U. S. 322, 336."

It will be observed that the Supreme Court, in *Packard v. Banton,* supra, especially approved *Hutchinson v. Beckham,* 118 Fed. 399. This case was a suit instituted by the plaintiff seeking an injunction to restrain the enforcement of an ordinance levying a license tax upon the plaintiff amounting to $1,200.00 per year, on the principal ground that the imposition of the tax was a burden on the business of plaintiff who was engaged in interstate commerce. We quote at length from the opinion in this case:

"Concerning the last of these questions, which will be noticed first, it is quite sufficient to say that the complaint which was filed in the lower court may be appropriately termed a 'bill of peace.' Story, Eq. Jur. Sections 852, 853. It was filed to obtain a definite determination that the ordinance complained of was void, also to prevent harassing litigation, and to establish the complainants' right to transact business in the city of Hutchinson, as it had been

doing for some years, without complying with the terms of the ordinance. One paragraph of the bill, as heretofore shown, alleged that the city authorities, for the purpose of enforcing compliance with the ordinance, had already caused the arrest of their agents, and were threatening to make further like arrests, and to institute numerous criminal prosecutions, and thereby prevent them from receiving, storing, and making speedy deliveries of goods, as had been their habit. Now, conceding that the validity of the ordinance might have been tried in any one of the criminal prosecutions thus brought by the city, yet, as the right of appeal existed from any judgment which might have been rendered therein, it is apparent that months, and possibly some years, might have elapsed before the invalidity of the ordinance would have been definitely established, and that in the meantime the complainants might and probably would have been compelled to defend a multitude of suits, and submit to daily interruptions of their business, which would have proven to be very annoying, and probably disastrous. In such a case, the rule that a suit in equity will not lie to restrain the collection of an illegal tax, merely on the ground of its illegality, does not apply, because circumstances are alleged which show that if left to their remedy at law the complainants would probably be subjected to numerous prosecutions, besides sustaining great and irreparable loss in the prosecution of their business. When, in addition to the fact that an illegal tax has been imposed, it further appears that the persons or corporations upon whom it is imposed will be called upon to defend a multitude of suits, or that they will sustain great injury if the state or municipality is left free to enforce the tax by the usual remedies, courts of equity never hesitate to assume jurisdiction and grant injunctions against those who are seeking to enforce the collection of the tax if it appears to be clearly illegal. Dows v. City of Chicago, 11 Wall. 108; Railway Co. v. Cheyenne, 113 U. S. 516, 525; City of Ogden v.

Armstrong, 168 U. S. 224, 239, 240; Heywood v. City of Buffalo, 14 N. Y. 534.

"The other and broader objection to the jurisdiction, that the amount in controversy is inadequate to confer jurisdiction upon the federal court, is based upon the ground that as the bill was filed on August 29, 1900, and the tax from June 1, 1900, to December 31, 1900, was only $500, that was the sole sum in controversy. Counsel for the city say it was only claiming at the time $500, and that the right to collect that amount from the complainants was the only matter in controversy. We think, however, that this view of the case is too narrow and technical. The right which the complainants asserted was the right to transact their business in the city of Hutchinson as theretofore, without being subjected to the onerous and discriminating tax which the municipality had seen fit to impose. They averred that, if the city was left at liberty to enforce the tax in its own way by making daily arrests of its employees, they would eventually quit its service; that the complainants and all other nonresident merchants in their situation would be subjected to the cost and annoyance of defending repeated suits; that they would also be prevented from carrying on their business as they had theretofore done; that they would be compelled to transact business in competition with dealers residing in the city of Hutchinson who were not subject to the tax; and that in this way they would sustain damages in a sum exceeding $2,000. These allegations were admitted by the demurrer to be true if they were material allegations. From the complainants' standpoint, therefore,—and the case must be judged from their standpoint, and not exclusively from the standpoint of the city,—the amount involved in the litigation was not merely the license tax of $500 which accrued on June 1, 1900, but it was the total amount of their loss incident to the causes aforesaid, if the bill was not entertained, and if the city was left free to pursue its

own course in enforcing the ordinance. Our attention has been invited to several cases which were brought to enjoin the collection of taxes that were alleged to be illegal, in which it was held that the amount in controversy for jurisdictional purposes was the amount of the tax (Transfer Co. v. Pendergrass, 70 Fed. 1; Walter v. Railroad Co., 147 U. S. 370; Railroad Co. v. Walker, 148 U. S. 391); but an examination of these cases shows that they are not analogous to the case at bar, in that it did not appear that the complainants would sustain any other direct damage save the amount of the tax, which if paid under protest, they could recover in an action at law, if the tax was found to be illegal. The present case is distinguishable from the cases relied upon by the appellants, in that the tax involved is a license tax imposed by a municipality upon a business concern, the payment of which tax may be enforced by fining and imprisoning its employees and by daily arrests that will seriously interfere with the prosecution of complainants' business, and inflict a much greater direct loss than the amount of the tax. The suit at bar, in view of the allegations touching the effect upon the complainants' business, if the city is permitted to proceed with the enforcement of the ordinance in its own way, is in reality a bill to prevent the city from breaking up and destroying an established business under the guise of enforcing an illegal ordinance. The pecuniary loss which the complainants would sustain by such an interference with or destruction of their business may, as we think, be properly taken into account in determining the amount in controversy; and, as the bill alleges and the demurrer admits that the damages incident to such wrongful conduct on the part of the city will exceed $2,000, we are of the opinion that the jurisdiction of the federal court to entertain the bill was rightfully upheld. The decree below is accordingly affirmed."

(See to the same effect *Southern Exp. Co. v. Ensley*, C. C. Ala., 1902, 116 Fed. 756.)

"Where, in an action by a foreign express company engaged in interstate commerce against a city to restrain the enforcement of an ordinance exacting a license fee, the bill states that the value of the company's right to do business in such city exceeds the jurisdictional amount, the federal court has jurisdiction, though the amount of the license fee is less than such amount. *City of Hutchinson v. Beckham*, (Kan. 1902) 118 Fed. 399; *Southern Exp. Co. v. City of Ensley*, (C. C. Ala. 1902) 116 Fed. 756."

"In a suit to enjoin the enforcement of a city ordinance alleged to impose a tax on interstate commerce, federal jurisdiction was determined by the value of the right to be protected, and not the amount of the tax to be enjoined. *Jewel Tea Co. v. Lee's Summit*, Mo. (D. C. Mo. 1912) 198 Fed. 532, affirmed (C. C. A. 1914) 217 Fed. 965."

"In a suit to enjoin the enforcement of an ordinance imposing a license tax on complainants' business, alleged to be prohibitory, the amount in controversy, for the purpose of determining the jurisdiction of a federal court, is the value of such business. *Humes v. City of Little Rock* (C. C. Ark. 1898) 138 F. 929."

Real Silk Hosiery Mills v. Portland et al., 268 U. S. 325, is a case in which plaintiffs sought to enjoin the enforcement of a license tax by the City of Portland amounting to $12.50 quarterly upon twenty of its employees or agents. The court sustained the injunction on the ground that the tax was a burden on interstate commerce. It is true that the amount was not questioned in the court, but, unless the court had been of the opinion that the right to do business was the determinative question, it could not have sustained the jurisdiction unless

either it was of the opinion that the value was more than $3,000.00, although the tax was much less, or the suit was one authorized to be brought under Section 41 (14), Title 28, U. S. C. A.

In the case of *New York Life Insurance Co. v. Swift*, 38 Fed. (2nd) 175, decided by the Fifth Circuit Court of Appeals on February 10th, 1930, the doctrine of these cases is expressly approved in these words:

> "In a suit to prevent a future loss or damage to the plaintiff, the object to be gained by the bill is the test of the jurisdictional amount; in other words, the value of the right to be protected. If that exceeds $3,000, the District Court has jurisdiction regardless of the amount of damage that has presently accrued," citing the cases from the Supreme Court upon which we rely.

Cudahy Packing Co. v. Hinkel, 278 U. S. 460, was a suit by the Packing Company to enjoin, as a burden on interstate commerce, a filing fee amounting to $545.00 and a license fee or tax amounting to $580.00. These two amounts were the total amount of taxes involved in the case. The Supreme Court, although not mentioning the matter of the amount in controversy, reversed the lower court and directed the issuance of a permanent injunction enjoining and restraining the collection of the tax. The same case in the court below is reported in 24 Fed. (2nd) 124. The facts alleged in the bill are identical with those alleged in the case at bar in that they alleged that the enforcement of the civil and criminal provisions of the statute would interfere with, if not destroy, the business of the plaintiff.

In addition to the foregoing authorities, we ask the court to consider the following:

Scott v. Donald, 165 U. S. 107.

Western & Atlantic R. R. v. Railroad Commission of Ga., 261 U. S. 264.

Glenwood Light & Water Co. v. Mutual Light, Heat & Power Co., 239 U. S. 121.

Adams v. New York Trust Co., 37 Fed. (2nd) 826 (5th Circuit).

Campbell Baking Co. v. City of Maryville, 31 Fed. (2nd) 466 (District Court, Missouri).

The following cases were expressly approved by the Supreme Court in *Packard v. Banton*, supra:

Nashville, etc. R. R. Co. v. McConnell, 82 Fed. 65 (See page 73.)

Texas & Pacific R. R. Co. v. Kuteman, 54 Fed. 547 (5th Circuit) (See page 552.).

Evenson v. Spaulding, 150 Fed. 517.

We undertake only a very slight review of these cases.

In *Scott v. Donald*, supra, the right involved was the right to import liquors into the State of South Carolina free from the restrictions of its dispensory law. It is true that it was agreed that that right was worth more than $2,000.00. In the case at bar, the admission of the motion to dismiss has the same effect as an agreement.

In *Glenwood Light etc. Co. v. Mutual Light etc. Co.*, supra, the right involved was the right to an injunction enjoining interference with plaintiffs' electric light poles and wires. The lower court went off upon the proposi-

tion that the jurisdictional amount was fixed by the cost to the defendant of removing the poles, etc. which it had erected. The Supreme Court said that the true test was the value of the object of the suit, or the value of the right to be maintained.

In *Western & Atlantic R. R. v. Railroad Commission*, supra, the right involved was one to an injunction restraining the State Railroad Commission from enforcing the erection of a sidetrack costing $1,266.24.

In *The Campbell Baking Co. v. City of Maryville*, the right involved was that to an injunction enjoining the enforcement of an ordinance levying a privilege license of $200.00 annually on a business whose net profits amounted to $357.00. In this, as in all of the cases to which we have referred, the court held that the requisite jurisdictional amount was involved.

In *Texas & Pacific R. R. Co. v. Kuteman*, supra, the Circuit Court of Appeals for the Fifth Circuit reiterated the rule for which we contend on page 552: that in a suit for an injunction, the amount in the suit is the value of the object to be gained by the bill.

POINT II.

IS THE RIGHT, PRIVILEGE, OR IMMUNITY ASSERTED ONE SECURED BY THE CONSTITUTION OF THE UNITED STATES WITHIN THE PURVIEW OF SECTION 41 (14), Title 28, U. S. C. A.?

Under this provision of the jurisdictional statute, the actual amount in controversy is immaterial. The jurisdiction of the court below was based in the bill upon the above mentioned fact (R. 3).

"SUIT TO RESTRAIN ENFORCEMENT OF UNCONSTITUTIONAL LAW.—The federal court has jurisdiction of a suit brought against an officer of the state to restrain the enforcement of a law upon the ground that such law is in violation of the Constitution of the United States. Crane v. Johnson (D. C. Cal. 1916) 233 F. 334, (affirmed (1917) 242 U. S. 339, and (1917) 242 U. S. 344), following Truax v. Raich (Ariz. 1915) 239 U. S. 33, which affirmed (D. C. Ariz. 1915) 219 F. 273."

Terrace v. Thompson, 263 U. S. 197, was a case which, of course, caused a great deal of comment in this country. It was a suit by a citizen of Washington and a subject of Japan to enjoin the enforcement of the statute passed by the State of Washington, the manifest intent of which was to deprive Japanese of the right to own lands or the right to engage in the business of farming. The report of the case makes no reference to any value involved. The jurisdiction of the court was vigorously challenged.

"Equity jurisdiction will be exercised to enjoin the threatened enforcement of a state law which contravenes the Federal Constitution wherever it is essential, in order effectually to protect property rights and the rights of persons against injuries otherwise irremediable; and in such a case a person who, as an officer of the state, is clothed with the duty of enforcing its laws, and who threatens and is about to commence proceedings, either civil or criminal, to enforce such a law against parties affected, may be enjoined from such action by a Federal court of equity."

POINT III.

IS THERE EQUITY UPON THE FACE OF THE BILL?

Counsel for appellants proceed upon the theory that the only ground for equitable relief alleged in the bill was

that to prevent a multiplicity of suits. In this they are mistaken.

The following equitable grounds were pleaded and relied upon in the court below.

1. Prevention of a multiplicity of suits (R. 12-13).

2. There is no adequate remedy at law for the reason that appellees were without remedy in any event to collect the commissions allowed appellant Matthews, Tax Collector, amounting to ten (10%) per cent of the amount collected, and no remedy allowed by the Laws of the State of Mississippi to recover any damages that might be assessed against them (R. 14-15).

3. By the Laws of the State of Mississippi, the right and remedy to restrain the enforcement and collection of an illegal tax is enlarged, and the right of injunction is granted, which right may be enforced in the courts of the United States (R. 15).

4. The imminent danger of irreparable damage to appellees by reason of the impairment or destruction of their business for which no remedy existed (R. 15).

5. Irremedial damage to appellees in that the enforcement of the statute would interfere with the fulfillment of contracts made by them then outstanding, for which no remedy at law existed (R. 15-16).

6. Prevention of a multiplicity of suits from an angle different from that presented under 1 (R. 16).

We undertake to discuss such of these grounds of relief as we believe necessary.

(a). Multiplicity of suits.

We quote *32 Corpus Juris*, 89:

> "WHAT CONSTITUTES A MULTIPLICITY OF SUITS, such as to justify the interference of equity, cannot be determined by any fixed rule. It has been said that each case apparently is made to stand on its own peculiar facts, at least if the case is not brought directly within the principle of some preceding case. Before several actions at law will be enjoined in order that the controversies may be determined in a single suit, it must appear that the different suits may be determined by the settlement of one or more issues of law or fact common to them all. The mere fact that there is a multitude of actions does not in itself constitute multiplicity of actions in such sense that equity will enjoin them. The bringing of several suits will not be enjoined merely for the purpose of preventing costs or expenses of separate actions."

Pomeroy's Equitable Remedies, Vol. 1, Sec. 372, page 658:

> "MULTIPLICITY OF SUITS.—This ground of jurisdiction has met with abundant recognition in cases of the 'Second Class' and of the 'Fourth Class'; but appears to have been rejected in one case of the 'Third Class,' where the equity arises from the fact that the burden of an illegal tax falls on numerous individuals in the same way. This class is, at any rate, confined to cases where the tax as a whole is invalid, and in any event the jurisdiction is asserted to prevent a probable, not a possible, multiplicity of suits."

In *Hale v. Allison*, 188 U. S. 56, we quote from the opinion:

> "The question has been answered differently by different courts, and while assuming that there was

an action to recover, the court said (p. 72): 'but where the tax is unauthorized by law we have held that it was the duty of a court of equity to interfere, especially when the recovery of the tax would necessitate a multiplicity of suits.'

* * *

"And in Greedup v. Franklin County, 30 Ark. 101, in referring to a remedy at law by actions to recover back, the court said (p. 110): 'What a multiplicity of suits at law must be brought in order to get redress for an injury which it is proposed to stop in a single suit in equity. We have no means of ascertaining the number of taxpayers in Franklin county, but may suppose they exceed 2,000. Of these perhaps 500 may be able to assert their rights at law, whilst 1,500, who pay less tax, are in moderate circumstances, or too poor to employ counsel to stop the payment of an erroneous tax ten times less than it would cost to employ counsel to prosecute the suit. The mere suggestion of the situation, if left to redress at law, shows that it, in effect, would amount to a denial of redress to offer it to them. In such cases chancery will interfere to prevent multiplicity of suits.

* * *

"A single individual has a legal remedy by taking out a license and suing to recover the money paid for it. Practically it is worthless. He can more cheaply and with less annoyance pay and submit to the exaction than protest and recover. If there were but a few individuals involved equity would leave them to their imperfect legal remedies, and let them go largely unredressed. It is only in combination that they can have effective relief. A representative suit, staying prosecutions until the city's right is determined, does the work. Whether relief should be given in equity is not a question of power or of substantive law, but of right procedure. A court of equity can assume jurisdiction without usurpation. It does the city no wrong. No right to jury

trial is involved. Whether the issue is tried at law or in equity the questions are wholly of law. Indeed, the city might well enough welcome a settlement in one speedy suit. Under our present practice the hearing on appeal from an injunctional order can be had without delay and a speedy result reached. If the suggestion is made that such has not been the result in this case, the answer is that the delay has been because of the controversy over procedure, now settled, never of considerable moment to either party, but important enough, as establishing a precedent, to demand deliberation."

We also quote from note, page 1267:

"By the great weight of authority several taxpayers affected in a similar manner by an illegal tax or license fee may join in a proceeding in equity to restrain the enforcement of the tax and for such other relief as the nature of the case represented may require, provided it is common to all of them" citing King v. Wilson, 1 Dill., 555, Fed. Cas. No. 7,810; Risley v. Utica, 173 Fed. 502, appeal dismissed in 100 C. C. A. 688, 177 Fed. 1005.

Likewise, to support the above quotations, cases are cited from the States of Alabama, Arkansas, Colorado, Illinois, Indiana, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Georgia, Missouri, New Hampshire, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, Virginia, and West Virginia.

(b) There is no adequate remedy at law.

The statute authorizing refunds of taxes illegally or unlawfully paid, Section 8270 of Hemingway's Code, only operates on such taxes or moneys as may have been paid into the Treasury of the State. The percentage allowed

the tax collector is retained by him, and never paid into the State. It is a common and universal operation of the Statute that such percentages are never refunded to a taxpayer. For that reason the remedy is inadequate, and for the further reason that, to test the constitutionality of the statute, it would be necessary either for the taxpayer to pay money, part of which he could not recover, or to submit to a criminal prosecution which would seriously interfere with and impair his business. This is not an adequate remedy.

We quote the following from *Shaffer v. Carter*, 252 U. S. 37:

> "Statutes which may furnish an adequate legal remedy against taxes assessed under an unconstitutional law do not bar resort to equity by a taxpayer who avers that the tax lien asserted by virtue of the levy and tax warrant, itself attacked on constitutional grounds, creates a cloud on title, where there appears to be no legal remedy for the removal of a cloud on title cast by an invalid lien imposed for a tax valid in itself."

In *Cable v. United States L. Ins. Co.*, 191 U. S. 288, it is said:

> "The remedy or defense at law which will oust an equity court of jurisdiction must be as complete and as adequate, as sufficient and as final, as the remedy in equity, or else the latter court retains jurisdiction; and it must be a remedy which may be resorted to without impediment created otherwise than by the act of the party, and the remedy of defense must be capable of being asserted without rendering the party asserting it liable to the imposition of heavy penalties or forfeitures, arising other than by reason of its own act."

In *Walla Walla v. Walla Walla Water Company*, 172 U. S. 1, the court said:

> "The remedy at law, in order to exclude a concurrent remedy in equity, must be as complete, as practical, and as efficient to the ends of justice and its prompt administration as the remedy in equity."

There is no adequate legal remedy for the further reason that the sole right for the recovery of the taxes in question by the plaintiffs is that of mandamus in the Circuit Court of Hinds County, Mississippi, against the auditor of the State and the attorney general. This is not an adequate remedy in the eyes of this court for the reason that mandamus is not a suit of a civil nature contemplated by the jurisdictional statutes conferring jurisdiction upon the district courts of the United States.

Southern Ry. Co. v. Query, 21 Fed. (2nd) 333, was a suit in the district court before Parker, a Circuit Judge, and Watkins and Cochran, District Judges, composing the three judge court. It was one to enjoin the collection of income taxes by the State Tax Commission of the State of South Carolina. It was urged that the plaintiff in that case had an adequate remedy at law. We quote the opinion of Judge Cochran dealing with this question:

> "The defendants contend that Act No. 571 of the General Assembly of South Carolina (32 St. at Large, p. 1017), entitled 'An act to authorize and empower the South Carolina tax commission to order an abatement or refund of taxes in certain cases, * * * approved the 22nd day of March, A. D. 1922,' gives the plaintiff a complete and adequate remedy at law. It is provided in that act that, whenever it shall appear to the satisfaction of the South Carolina tax commission that any tax has been paid under an erroneous, improper, or illegal assessment, such commission shall have the power and authority to

order any officer having custody of the taxes so erroneously, improperly, or illegally paid, to refund the same, etc. Section 4 of the same act provides that it shall be in addition to any remedies for the abatement or refund of taxes that may now be provided by law. The Supreme Court of South Carolina, in Bank of Johnston v. Prince, 136 S. C. 439, 134 S. E. 387, held that the remedy was concurrent with other remedies for abatement of taxes and that mandamus would lie to compel the county officers to obey an order of the tax commission directing a refund. The view of the defendants is that, if the plaintiff can show that the tax has been illegally or improperly assessed and the tax commission should refuse to order its refund, it has its remedy at law by mandamus to compel the defendants to issue an order requiring refund. But we do not think that this remedy is adequate. In the first place, it is not available in the federal courts, because it is well settled that the federal courts have no power to issue a writ of mandamus as an original proceeding. Covington & Cincinnati Bridge Co. v. Hager, 203 U. S. 109. In order to prevent a court of equity in the federal courts from assuming jurisdiction in a proper case, the remedy at law must be available in the federal courts, and, where the machinery provided by the act is unknown to the federal courts, the remedy is inadequate. This is illustrated by the decision of the Supreme Court in Chicago, B. & Q. R. Co. v. Osborne, 265 U. S. 14. In that case, the remedy provided was by writ of error issuing from the Supreme Court of the State to the tax body levying the assessment, and it was held that such writ of error could be sued out only from the state Supreme Court and was not available in the federal courts."

(c). Section 304 of Hemingway's Annotated Mississippi Code 1927 (now Section 420, Mississippi Code 1930)

creates new right in equity enforceable in the courts of the United States. We quote the section:

> "304. (290) RESTRAINT OF COLLECTION OF TAXES.—The chancery court shall have jurisdiction of suits by one or more taxpayers in any county, city, town, or village, to restrain the collection of any taxes levied or attempted to be collected without authority of law."

We quote *Pomeroy's Equitable Remedies*, Vol. 1, Section 375:

> "375. INJUNCTION WARRANTED BY STATE LAWS.—Where the federal court acquires jurisdiction of the case and facts are shown which, under the state law, warrant the issuance of an injunction, such relief may be awarded, whether the facts are such as ordinarily warrant such relief in federal courts, or not. Thus, under section 5848 of the Ohio statutes providing that the illegal levy of taxes and assessments, or either, may be enjoined, a federal court may enjoin an increase in the assessment of a national bank, illegal because made by a board of equalization without notice. Under the same statute, the federal court may enjoin the collection of any tax found to be illegal, such, for instance, as a tax on federal bonds which are exempt from taxation. Likewise, where, under the decisions of the supreme court of Kansas an injunction will issue when one class of property is intentionally assessed in greater proportion than another, federal courts, in like cases coming from that state, will grant an injunction. And, following the supreme court of Washington, an injunction will be granted where there has been an unjust discrimination."

In *Cummings v. Merchants' Nat. Bank*, 101 U. S. 153, it is said:

> "But the Statute of the State expressly declares that suits may be brought to enjoin the illegal levy

of taxes and assessments or the collection of them. Section 5848 of the Revised Statutes of Ohio, 1880; Vol. LIII., Laws of Ohio, 178, secs. 1, 2. And though we have repeatedly decided in this court that the statute of a state cannot control the mode of procedure in equity cases in Federal Courts, nor deprive them of their separate equity jurisdiction, we have also held that, where a statute of a State created a new right or provided a new remedy, the Federal Courts will enforce that right either on the common law or equity side of its docket, as the nature of the new right or new remedy requires. Van Norden v. Morton (ante. 453). Here there can be no doubt that the remedy by injunction against an illegal tax, expressly granted by the Statute, is to be enforced, and can only be appropriately enforced in the equity side of the court."

See:

Bunckerhoff v. Broomfield, 94 Fed. 422.
Grether v. Wright, 75 Fed. 742, 23 C. C. A. 498.
Chicago B. & Q. R. Co. v. Board of Commissioners of Republic Co., 67 Fed. 411, 14 C. C. A. 456.
First National Bank v. Hungate, 62 Fed. 548.
Pusey & Jones Co. v. Hanssen, 261 U. S. 491.

In the above case, the Supreme Court was called upon to determine whether or not a Statute of Delaware authorizing a chancellor to appoint a receiver of a corporation on the application of a simple contract creditor should be enforced in the Federal Court. The court reviews all the authorities and concludes that that particular statute was not enforceable. The substance of the decision is (following *Cates v. Allen,* 149 U. S. 451; and *Scott v. Neely,* 140 U. S. 106) that the statute created equitable jurisdiction in a case where equity had not theretofore had jurisdiction. It is held that the statute did not create a substantive equitable right to have a

receiver appointed, and therefore was unenforceable in the Federal Court. The statute gives to a person in Mississippi, from whom taxes are about to be unlawfully extorted, the substantive, absolute, right.

Grether v. Wright, 75 Fed. 742, was a suit to enjoin the collection of taxes, filed in the Circuit Court for a district of Ohio. The sole ground for the injunction was the illegality of the tax, and the fact that the Ohio statute, like the Mississippi statute, had created the remedy. The court was composed of Taft and Lurton, Circuit Judges, and Hammond, District Judge. The opinion was written by Judge Taft. The jurisdiction was attacked on the ground of no equity on the face of the bill. Judge Taft undertook to review all of the authorities. As a predicate for the decision, he quotes the Ohio statute. The material words of the statute are as follows:

> "Courts of common pleas and superior courts shall have jurisdiction to enjoin the illegal levy of taxes and assessments or the collection of either, * * *."

He first points that it was in reliance upon this provision of the statute and three succeeding statutes that the Supreme Court, in *Cummings v. Bank*, grounded its decision in holding that there was equity upon the face of the bill in that case. He quotes extensively from the opinion in that case, and states that, although there were several grounds upon which equitable jurisdiction could have been sustained in *Cummings v. Bank*, nevertheless, it was obvious that the court regarded the statute conferring the remedy by injunction as a sufficient reason for exercising the jurisdiction. He then proceeds to review the cases in which *Cummings v. Bank* had been referred to upon this point with approval by the Supreme Court. Further pursuing the subject, he refers to all

of the cases from the Supreme Court where the principle for which we contend had been applied.

He then proceeds to examine exhaustively the cases of which *Scott v. Neely* and *Cates v. Allen* are examples, where the court denied the jurisdiction, and points out with great clarity that the rationale of all of these cases is that the true reason for the court denying jurisdiction was the fact that the State Statute, in effect, denied the right of trial by jury. He then proceeds to discuss whether or not the state officers, who were parties defendant to that suit, were entitled to the right of trial by jury on the question presented in the injunction case, to-wit: the illegality of the tax. The substance of his conclusions is that the taxpayer is never entitled to the right of trial by jury as to the amount of taxes due by him, referring, for his conclusions, to the line of cases where the Supreme Court has pointed out that the right of taxation by a government is the very essence of its existence, and that this right, without interference from the judicial system, has been and must be exercised in order that the Government may exist. Arriving, therefore, at the conclusion that the taxpayer himself is without the right of trial by jury, he concludes his opinion on this point with the proposition that the state, having denied to the taxpayer the right of trial by jury, places its officers in a position where they cannot insist upon that right. We quote a very small portion of his opinion on this feature of the matter:

> "In other words, this right of a jury trial is one which may be waived, and, where a state makes provision in suits against itself for a remedy, either by injunction or by payment of the money to its officers and a suit for recovery, it must be taken to waive any right which it or its representatives might have to a jury trial, by offering to its taxpayers a remedy

by injunction on the sole ground of illegality. It might be that the state taxing officer sued in assumpsit or for trespass by reason of the receipt of illegal taxes, or the unlawful distraint of property, would have, because of his possible individual liability, a right of jury trial in the courts of the United States under the seventh amendment; but a suit to enjoin his receipt of the money or his distraint of the goods does not interfere with such a right, because it must intervene, if at all, before he can assume any personal liability in regard to the matter. The justiciable issue at the time of the injunction is between the taxpayer on the one hand and the state on the other, represented by its officers; and, unless the state has the right of jury trial, and insists upon it, they cannot complain. * * * In the exercise of this discretion, the state of Ohio has enacted into law chapter 13 of title 1 of division 7 of the Revised Statutes of Ohio as a special mode by which taxpayers may test the legality of a tax, and the easiest and best of the remedies given is that by injunction. Must a court of equity of the United States, sitting in Ohio, say to one asking the benefit of this remedy conceded by the state: 'True, the state may deprive you of a trial by jury if it sees fit in tax litigation with itself, but when the state in such suits of its own gives you the option of a jury trial or an injunction, we must force a jury trial on you?' We think not. Our conclusion, therefore, is that there is no conflict between Cummings v. Bank and the cases of which Scott v. Neely is a type. The case of Cummings v. Bank is still quoted by the Supreme Court of the United States as an authority to sustain the view that a new equitable right secured by statute of the state may be enforced on the equity side of the federal court, provided it does not interfere with the right of trial by jury. The case has never been questioned or dissented from, and even if we were not able to explain a possible conflict between that and some other cases since decided by the supreme court, we should still

not always a necessity to show a common interest or privity between the members of the same class of defendants, the courts have also differed in regard to the jurisdiction of a court of equity in particular cases, even upon such assumption. Numerous cases are cited by Mr. Pomeroy, showing both sides of this question. In any case where the facts bring it within the possible jurisdiction of the court, according to the view taken by it in regard to such facts, the decision must depend largely upon the question of the reasonable convenience of the remedy, its effectiveness, and the inadequacy of the remedy at law."

* * *

"Cases in sufficient number have been cited to show how divergent are the decisions on the question of jurisdiction. It is easy to say it rests upon the prevention of a multiplicity of suits, but to say whether a particular case comes within the principle is sometimes a much more difficult task. Each case, if not brought directly within the principle of some preceding case, must as we think, be decided upon its own merits and upon a survey of the real and substantial convenience of all parties, the adequacy of the legal remedy, the situations of the different parties, the points to be contested and the result which would follow if jurisdiction should be assumed or denied; these various matters being factors to be taken into consideration upon the question of equitable jurisdiction on this ground, and whether within reasonable and fair grounds the suit is calculated to be in truth one which will practically prevent a multiplicity of litigation, and will be an actual convenience to all parties, and will not unreasonably overlook or obstruct the material interests of any. The single fact that a multiplicity of suits may be prevented by this assumption of jurisdiction is not in all cases enough to sustain it. It might be that the exercise of equitable jurisdiction on this ground, while preventing a formal multi-

plicity of suits, would nevertheless be attended with more and deeper inconvenience to the defendants than would be compensated for by the convenience of a single plaintiff; and where the case is not covered by any controlling precedent the inconvenience might constitute good ground for denying jurisdiction."

Fairley v. Duluth, 150 Minn. 374, 185 N. W. 390, 32 A. L. R. 1258, (and extensive note), was a suit by the owner of an automobile seeking to restrain the enforcement of an ordinance of the City of Duluth imposing upon owners of automobiles a wheelage tax. The suit was instituted by one citizen who alleged that he was the owner of an automobile, and that there were approximately 4200 others owning automobiles in said City in like situation for whom the suit was prosecuted. Objection was made that there was no equity on the face of the bill, and that plaintiff had adequate remedy at law. We quote from the opinion:

"Some courts, in determining whether there is jurisdiction in equity, refer to the avoidance of a multiplicity of suits, and the cluttering of the courts with numerous pieces of litigation, involving a single principle, which might be settled in one suit, the principle involved being one in which all similarly situated have a community of interest, though their property interests are distinct and separate.

"The general rule is that the plaintiff, who will not be subjected to numerous suits, cannot state a cause of action in equity based upon the ground that the defendant will be saved a multiplicity of suits. Equitable Life Assur. Soc. v. Brown, 213 U. S. 25. But in determining the propriety of proceeding by injunction courts have referred to the multiplication of litigation as proper for consideration. Thus, in Drainage Comrs. v. Kinney, 233 Ill. 67, 84 N. E. 34, while recognizing that there was a legal remedy by

feel ourselves bound in a case like the present, in which the case of Cummings v. Bank has exact application, to follow it, and to leave to the supreme court the duty of overruling the one or the other of the two conflicting lines of decision."

North Side Canal Co. v. State Board of Equalization, 17 Fed. (2nd) 55 (C. C. A., 8th Circuit), was a suit on behalf of certain parties to enjoin the levying and assessment or collection of a tax on certain lands. The point was made that the court was without equitable jurisdiction because the only ground of equity was the illegality of the tax. We quote from the opinion of the court:

"The only ground for equitable relief stated in the complaints was that the tax levies were illegal and void; and their sufficiency for equitable relief was challenged below and that contention is advanced here. Ordinarily the objection would be good. Shelton v. Platt, 139 U. S. 591; Risty v. Railway Co. (C. C. A.) 297 F. 710. In opposition to this contention appellants rely on section 6302, Wyoming Comp. Stat. 1920, which reads:

"'District courts shall have jurisdiction to enjoin the illegal levy of taxes and assessments, or the collection of either, and of actions to recover back such taxes or assessments as have been collected, without regard to the amount thereof; but no recovery shall be had unless the action be brought within one year after the taxes or assessments are collected.'

"This statute was construed by the Supreme Court of Wyoming in Bunten v. Rock Springs Grazing Ass'n., 29 Wyo. 461, 215 P. 244, and it was said that the section was adopted from Ohio, and under its provisions a plaintiff need not aver and show, in addition to the illegality of the tax, facts bringing the case under some acknowledged head of equity jurisdiction, that it is sufficient to only aver

that the tax is illegal. The Ohio statute was considered by the Supreme Court in Cummings v. Merchants' National Bank, 101 U. S. 153, and the court held that the statute created a new right and provided a new remedy, and that right and remedy would be enforced in the Federal court within the State creating the new right and remedy. The Court of Appeals for the Sixth Circuit has followed the Cummings Case in applying the Ohio statute. Grether v. Wright (C. C. A.) 75 F. 742; Mercantile National Bank v. Hubbard (C. C. A.) 105 F. 809; McKnight v. Dudley (C. C. A.), 148 F. 204. A like statute of Arkansas has been followed by the Federal court sitting in that State; Mudge v. McDougal, (D. C.) 222 F. 562. In Davis v. Gray, 16 Wall. 203, it is said:

> "'A party by going into a national court does not lose any right or appropriate remedy of which he might have availed himself in the State courts of the same locality.'

"And in Dawson v. Kentucky Distilleries & Warehouse Co., 255 U. S. 288, it is said:

> "'And if the equitable remedy was available in the State courts it was not lost by suing in the Federal court.'

"See also Darragh v. H. Watter Mfg. Co. (C. C. A.) 78 F. 7; Brun v. Mann (C. C. A.) 151 F. 145, 12 L. R. A. (N. S.) 154."

In the above case, writ of certiorari was denied by the Supreme Court on April 25th, 1927, in 47 Supreme Court, 586.

In the case of *Dawson v. Kentucky Distilleries & Warehouse Co.*, 255 U. S. 288, referred to in the foregoing case, there was presented the identical question which is here presented, and the point was strenuously urged upon the

court that the illegality of the tax conferred no equity jurisdiction. The court based its decision upon the fact that, although apparently there is no statute in Kentucky as we have in Mississippi, yet there is a long line of decisions of the Supreme Court of Kentucky upholding the right to an injunction in their equity courts by a plaintiff alleging the illegality of the tax. We gather from this case that, although the statute has not created the right, the courts having created the right, it is enforceable in the district court sitting in equity.

Boler v. Calloway, 267 U. S. 479, was a suit filed in the district court of Georgia to enjoin the collection of taxes. The third question determined by the court was the question of whether or not the district court had jurisdiction. It was said that it seemed that the only remedy intended to be furnished in Georgia was by injunction in equity. We quote a short excerpt from the opinion:

> "The case seems to be quite like that of Cummings v. Merchants' National Bank, 101 U. S. 153, in which, under a statute of Ohio authorizing a suit for injunction to prevent the collection of illegal taxes, it was held that a bill would lie in the federal court to enjoin the collection of a tax as illegal because it discriminated against the shares of a national bank."

THE MERITS

Under the admitted facts disclosed by the record, this case is brought squarely within the ruling in,

William Lemke vs. Farmers Grain Co., 258 U. S. 50;
Shafer vs. Farmers Grain Co., 268 U. S. 189;
Eureka Pipe Line Co. vs. Hallanan, 257 U. S. 265;
United Fuel Gas Co. vs. Hallanan, 257 U. S. 277;

Dahnke-Walker Milling Co. vs. C. T. Bondurant, 257 U. S. 282;
Ware & Leland vs. Mobile County, 209 U. S. 405;
Ozark Pipe Line Corp. vs. Monier, et. al., 266 U. S. 555;
Burton, et. al. vs. Clyne, etc., 258 U. S. 495;
Federal Trade Commission vs. Pacific States Paper Trade Association, 273 U. S. 52;
Foster Fountain Packing Co. Inc. vs. Haydel, 278 U. S. 1;
Leloup vs. Mobile, 127 U. S. 640;
Sprout vs. City of South Bend, 277 U. S. 163;
Helson vs. Commonwealth of Kentucky, 279 U. S. 245;
Binderup vs. Pathe Exchange, Inc., 263 U. S. 291;
United States of America vs. Erie Railroad Co., 280 U. S. 98;
New Jersey Bell Telephone Co. vs. State Board of Taxes, etc., 280 U. S. 338;
Carson Petroleum Co. vs. Vial, 279 U. S. 95;
Cudahay Packing Co. vs. Hinkle, 278 U. S. 460;
Bowman vs. Continental Oil Co., 256 U. S. 642.

The facts of the *Lemke case*, supra, and *Shafer case*, supra, and the conclusions reached by the Court are so clearly in conformity with the contention of appellees in this case, we take the liberty of quoting *in extenso* from the opinions in those causes.

The facts and conclusions of the Court in the *Lemke case*, through Mr. Justice Day, so far as pertinent to the case at bar, are as follows:

> "The record discloses that North Dakota is a great grain growing State, producing annually large crops, particularly wheat, for transportation beyond its borders. Complainant and other buyers of like character, are owners of elevators and purchasers of grain bought in North Dakota, to be shipped to and sold at terminal markets in other States, the prin-

cipal markets being at Minneapolis and Duluth. There is practically no market in North Dakota for the grain purchased by complainant. The Minneapolis prices are received at the elevators of the complainant from Minneapolis four times daily, and are posted for the information of those interested. To these figures the buyer adds the freight and his "spread," or margin of profit. The purchases are generally made with the intention of shipping the grain to Minneapolis. The grain is placed in the elevator for shipment, and loaded at once upon cars for shipment to Minneapolis and elsewhere outside the State of North Dakota. The producers know the basis upon which the grain is bought, but whoever pays the highest price gets the grain,—Minneapolis, Duluth, or elsewhere. This method of purchasing, shipment, and sale is the general and usual course of business in the grain trade at the elevator of complainant and others similarly situated. The market for grain bought at Emden is outside the State of North Dakota, and it is an unusual thing to get an offer from a point within the State. After the grain is loaded upon the cars it is generally consigned to a commission merchant at Minneapolis. At the terminal market the grain is inspected and graded by inspectors licensed under Federal Law.

"That such course of dealing constitutes interstate commerce, there can be no question. This Court has so held in many cases, and we have had occasion to discuss and decide the nature of such commerce in a case closely analogous in its facts, and altogether so in principle. *Dahnke-Walker Mill Co. v. Bondurant*, decided December 12, 1921 (257 U. S. 282, ante, 239, 42 Sup. Ct. Rep. 106). In that case the facts disclose that a company organized in Tennessee, and carrying on business there, went into Kentucky, and, through an agent there, bought wheat for shipment to the company's mill in Tennessee. The State Court held that the transaction was merely a purchase of wheat in Kentucky, and made the

Tennessee company amenable to the regulatory statutes of the State. This Court rejected the conclusion of the State Court, and held that the buying, no less than the selling of grain, under such circumstances, was a part of interstate commerce, committed to a national control by the Federal Constitution. Applying the principle of that decision, and the previous decisions of this court, cited in the opinion, the complainant's course of dealing in the buying of grain, which it purchased and sold under the circumstances herein disclosed, was interstate commerce. Being such, the state could not regulate the business by a statute which had the effect to control and burden interstate commerce.

"Nor is this conclusion opposed by cases decided in this Court and relied upon by appellants, in which we have had occasion to define the line between State and Federal authority under facts presented, which required a definition of interstate commerce where the right of State taxation was involved, or manufacture or commerce of an intrastate character was the subject of consideration. In those cases we have defined the beginning of interstate commerce as that time when goods begin their interstate journey by delivery to a carrier or otherwise, thus passing beyond state authority into the domain of Federal control. Cases of that type are not in conflict with principles recognized as controlling here. None of them indicates, much less decides, that interstate commerce does not include the buying and selling of products for shipment beyond state lines. It is true, that appellants contend, that after the wheat was delivered at complainant's elevator, or loaded on the cars for shipment, it might have been diverted to a local market or sent to a local mill. But such was not the course of business. The testimony shows that practically all of the wheat purchased by the complainant was for shipment to and sale in the Minneapolis market. That was the course of business, and fixed and determined the inter-

state character of the transaction. . . . (Citing authorities.)

"It is contended that these regulations may stand upon the principles recognized in decisions of this Court which permit the State to make local laws under its police power, in the interest of the welfare of its people, which are valid, although affecting interstate commerce, and may stand, at least until Congress takes possession of the field under its superior authority to regulate commerce among the States. This principle has no application where the State passes beyond the exercise of its legitimate authority, and undertakes to regulate interstate commerce by imposing burdens upon it. This Court stated the principle and its limitations in the discussion of the subject in the Minnesota Rate Case (Simpson v. Shepard), 230 U. S. 352, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18. In the course of the opinion in that case, we said (p. 400):

> " 'The principle which determines this classification (between Federal and State power) underlies the doctrine that the states cannot, under any guise, impose direct burdens upon interstate commerce. For this is but to hold that the states are not permitted directly to regulate or restrain that which, from its nature, should be under the control of the one authority and be free from restriction, save as it is governed in the manner that the natural legislature constitutionally ordains.'

"Thus, the States cannot tax interstate commerce, either by laying the tax upon the business which constitutes such commerce or the privilege of engaging in it, or upon the receipts, as such, derived from it. . . . (Citing authorities.)"

"Applying the principle here, the statute denies the privilege of engaging in interstate commerce,

except to dealers licensed by state authorities, and provides a system, which enables state officials to fix the profit which may be made in dealing with a subject of interstate commerce."

After the decision in the above cause, the State of North Dakota undertook once again to regulate the purchase of grain within North Dakota. This act was challenged and in the *Shafer case*, supra, in delivering the opinion of the Court, Mr. Justice Van DeVanter stated:

"A prior statute concededly 'having the same purpose' was adopted by the state legislature in 1919, and held invalid by this Court in *Lemke v. Farmers Grain Co.*, 258 U. S. 50, 66 L. Ed. 458, 42 Sup. Ct. Rep. 244, as an interference with interstate commerce. There are differences between that statute and the present one, of which the parties take divergent views. It would serve no purpose to take up these differences in detail. We shall describe the situation to which the present act is intended to apply, state its material provisions, and then come to its operation on interstate commerce.

"Wheat is the chief product of the farms of North Dakota, the annual crop approximating 150,000,000 bushels. About 10 per cent is used and consumed locally, and about 90 per cent is sold within the state to buyers who purchase for shipment, and ship to terminal markets outside the state. Most of the sales are made at country elevators to which the farmers haul the grain when harvested and threshed. These elevators are maintained and operated by the buyers as facilities for receiving the grain from farmers' wagons and loading it into railroad cars. The loading usually proceeds as rapidly as grain of any grade is accumulated in carload lots and cars can be obtained. When a car is loaded, it is sent promptly to a terminal market and the grain is there sold. This is the usual and recognized course of buying and shipment. Occasionally a farmer has his

grain stored in the country elevator, or shipped to a terminal elevator for storage, and awaits a possible increase in price; but even in such instances he usually sells to the buyer operating the country elevator, and the latter then sends the grain to the terminal market, if it has not already gone there.

"The price paid at the country elevators rises and falls with the price at the terminal markets, but is sufficiently below the latter to enable the country buyer to pay for the intermediate transportation and have a margin of profit. All transactions at the terminal markets, including the price, are based on the grade of the wheat, and by reason of this all buying at the country elevators is by grade.

"The grading at the terminal markets is done by inspectors licensed under the United States Grain Standards Act, who are required to apply to all interstate shipments the grading standards promulgated under that act by the Secretary of Agriculture. There are no inspectors licensed under that act at the country elevators; and so the grading is done there unofficially by the buyers or their agents as an incident and part of the buying.

"Grading includes an ascertainment of the proportions of clean wheat and of dockage in each lot of grain, and an ascertainment of the quality of the wheat. Dockage consists of separable foreign material, such as dirt, pieces of straw, chaff, weed stems, weed seeds, and grain other than wheat. Its proportion varies in different lots, but generally is less than 5 per cent. When not separated it causes the grain to bring a lower price per bushel than clean wheat would bring. When separated it has a value for poultry and stock feed which usually is in excess of the cost of separation. Occasionally the farmer separates it at the farm and sells only the clean wheat, and occasionally the buyer separates it at the country elevator, charges the farmer for that

service, and buys and ships only the clean wheat; but generally the grain is sold by the farmer and shipped by the country buyer with the dockage included. The influence of dockage on the value of the grain and the current modes of handling it are shown in publications of the Agricultural Department of the United States, pertinent excerpts from which are set out in the margin.

"As many as 2,200 country elevators are operated within the state in the business here described,—generally two or more by competing buyers at each station. Some of the buyers are individuals and others are corporations. A large number are farmers' co-operative companies, which buy grain grown by their stockholders and others in the vicinity of their elevators, ship and sell the same, and distribute as patronage dividends the surplus arising from such transactions—no profit being retained by the companies.

"The plaintiffs compromise, many buyers, individual and corporate, including eleven farmers' co-operative companies. In the aggregate they own and operate several hundred country elevators, widely distributed over the state, and buy and ship about 30,000,000 bushels of wheat per year. They carry on the business severally, each buying and shipping independently of the others. All buy with the purpose of shipping to and selling in terminal markets outside the state, and carry out this purpose in the manner already described."

The Court, after setting out the above facts, stated:

"Buying for shipment and shipping to markets in other states, when conducted as above shown, constitutes interstate commerce,—the buying being as much a part of it as the shipping. We so held in *Lemke v. Farmers Grain Co.*, 258 U. S. 50, 66 L. Ed. 458, 42 Sup. Ct. Rep. 244; following and applying the principle or prior cases. Later cases have given

effect to the same principle. *Stafford v. Wallace*, 258 U. S. 495, 516, 66 L. Ed. 735, 741, 23 A. L. R. 229, 42 Sup. Rep. 397; *Binderup v. Pathe Exchange*, 263 U. S. 291, 309, 68 L. Ed. 308, 316, 44 Sup. Ct. Rep. 96. Wheat—both with and without dockage—is a legitimate article of commerce and a subject of dealings that are nation wide. The right to buy it for shipment, and to ship it, in interstate commerce, is not a privilege derived from state laws, and which they may fetter with conditions, but is a common right, the regulation of which is committed to Congress and denied to the states by the commerce clause of the Constitution."

The Court likewise stated:

"We think it plain that, in subjecting the buying for interstate shipment to the conditions and measure of control just shown, the act directly interferes with and burdens interstate commerce, and is an attempt by the state to prescribe rules under which an important part of such commerce shall be conducted. This no state can do consistently with the commerce clause."

In the case at bar, it is conceded that all of the cotton purchased by appellees is actually shipped to points without the State of Mississippi and, therefore, it would be impossible to entertain any intention other than that this course would be followed and was so intended at the time of the purchase, even though certain "Overs" should have been disposed of locally by appellees to other Cotton Buyers. The latter bales of cotton likewise were intended ultimately to be shipped to foreign states and countries.

The *Dahnke-Walker Milling Co. case*, supra, approved in the *Lemke case*, supra, states the rule as follows:

"Such commerce (commerce among the several states) is not confined to transportation from one

state to another, but comprehends all commercial intercourse between different states and all the component parts of that intercourse. Where goods in one state are transported into another state for purposes of sale, the commerce does not end with the transportation, but embraces as well the sale of the goods after they have reached their destination, and while they are in the original packages . . . (citing authorities) . . . On the same principle, where goods are purchased in one state for transportation to another, the commerce includes the purchase quite as much as it does the transportation. . . ." . . ."Buying and selling and the transportation incidental thereto constitute commerce." . . . "Interstate commerce consists of intercourse and traffic between the citizens or inhabitants of different states and includes not only the transportation of persons and property and the navigation of public waters for that purpose, but also the purchase, sale and exchange of commodities. In no case has the Court made any distinction between buying and selling or between buying for transportation to another state and transporting for sale in another state.

"A corporation of one state may go into another without obtaining leave or license of the latter, for all legitimate purposes of such commerce and any statute of the latter state, which obstructs or lays a burden on the exercise of this privilege is void under the commerce clause."

In *Ozark Pipe Line Corporation vs. Monier*, supra, the Court stated:

"The tax is one upon the privilege or right to do business. . . .; and if appellant is engaged only in interstate commerce, it is conceded, as it must be, that the tax so far as appellant is concerned, constitutionally cannot be imposed. It long has been settled that a state cannot lay a tax on interstate commerce in any form—whether on the transporta-

of the City of South Bend, imposing a privilege tax, unconstitutional, the Court stated:

"By ordinance adopted in 1921, South Bend, Indiana, prohibited with exceptions not here material, the operation on its street of any motor bus for hire unless licensed by the city. Sprout, a resident of that state, operated regularly a bus with seats for twelve persons between points within South Bend and the city of Niles, Michigan. He paid the state registration fee but refused to apply for a city license. In 1923, he was prosecuted by the city in a local court for violation of the ordinance and defended on the ground that it was invalid as applied to him. The case was heard on agreed facts. Sprout claimed, among other things, that the ordinance violated the commerce clause and the equal protection clause of the 14th Amendment.

"The ordinance describes license fees varying with the seating capacity of the bus. That for a bus with seats for twelve persons is $50.00 a year.

"The requiremetns apply alike to busses operating wholly within the city and to those operating from points within it to points without. The ordinance makes no distinction between busses engaged exclusively in interstate commerce, those engaged exclusively in intrastate commerce, and those engaged in both classes of commerce.

"The claim that the ordinance violates the commerce clause presents questions requiring serious consideration. Sprout did not carry passengers from one point in South Bend to another. He was not a local carrier. Primarily his business was interstate. But the agreed facts show that he was not engaged exclusively in interstate commerce. The distance from the north city limits of South Bend to Niles is about nine miles. Half of this distance lies within Indiana along the highway traversed within

that state lie many suburban residences and one village tributory to South Bend. Sprout purported to offer transportation from that city only to persons destined to points in Michigan. He required that all passengers from South Bend pay the fare to some Michigan point. But, in fact, he served suburban passengers. He made stops habitually at points within Indiana, in order to permit passengers from South Bend to leave the bus before the state-line was reached. The legal character of this suburban bus traffic was not affected by the device of requiring the payment of a fare fixed for some Michigan point or by Sprout's professing that he sought only passengers destined to that state. The actual facts govern. For this purpose, the destination intended by the passenger when he begins his journey and known to the carrier, determines the character of the commerce. Compare *Philadelphia R. R. Co. v. Hancock,* 253 U. S. 284, 64 L. Ed. 907, 40 Sup. Ct. Rep. 512; *Baltimore & O. S. W. R. Co. v. Settle,* 260 U. S. 166, 171, 67 L. Ed. 189, 192, 43 Sup. Ct. Rep. 28. The suburban traffic was intrastate commerce.

"But it does not appear that the license fee here in question was imposed as an incident of such a scheme of municipal regulation; nor that the proceeds were applied to defraying the expenses of such regulation; nor that the amount collected under the ordinance was no more than was reasonably required for such a purpose. It follows that the exaction of the license fee cannot be sustained as a police measure. . . . (Citing authorities.). . .

"It follows that on the record before us the exaction of the license fee cannot be sustained either as an inspection fee or as an excise for the use of the streets of the city. It remains to consider whether it can be sustained as an occupation tax. A state may, by appropriate legislation, require payment of an occupation tax from one engaged in both intrastate and interstate commerce. . . . (Citing authori-

> ties). . . . And it may delegate a part of that power to a municipality. Compare *Postal-Teleg. Cable Co. v. Richmond,* 249 U. S. 252, 257, 63 L. Ed. 590, 593, 39 Sup. Ct. Rep. 265. But in order that the fee or tax shall be valid, it must appear that it is imposed solely on account of the intrastate business; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the imposition; and that the person taxed could discontinue the intrastate business without withdrawing also from the interstate business. . . . A state is equally inhibited from conditioning its exercise on the payment of an occupation tax."

In *Leloup vs. Mobile,* 127 U. S. 640, which latter case has been cited and affirmed, followed and approved in numerous instances, by this Court the rule is laid down, as follows:

> "No state has a right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce and amounts to a regulation of it, which belongs solely to Congress."

This principle was squarely presented to the Court in the *Bowman* case, supra, wherein it appeared that 95.5 per cent of the business transacted by the Oil Company in that cause was strictly intrastate and 5.5 per cent interstate, and the Court held specifically that inasmuch as the statute was inseparable and equally applicable to interstate as well as intrastate commerce, it could not be upheld. In delivering the opinion of the Court, Mr. Justice Pitney stated:

> "But with the license tax it is otherwise. If the

statute is inseparable, then both by its terms and by its legal operation and effect this tax is imposed generally upon the entire business conducted, including interstate commerce as well as domestic; and the tax is void under the authority of *Leloup v. Mobile,* 127 U. S. 640, 647, 32 L. Ed. 311, 314, Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; *Crutcher v. Kentucky,* 141 U. S. 47, 58, 59, 35 L. Ed. 649, 652, 653, 11 Sup. Ct. Rep. 851; *Williams v. Talladega,* 226 U. S. 404, 419, 57 L. Ed. 275, 281, 33 Sup. Ct. Rep. 116; and other cases of that character.

Upon the question of severability, we are constrained to concur in the view adopted by the district court; and this notwithstanding our hesitation, in advance of a declaration by the court of last resort of the state, to adopt a construction bringing the law into conflict with the Federal Constitution. *Ohio Tax Cases,* 232 U. S. 576, 58 L. Ed. 738, 745, 34 Sup. Ct. Rep. 372; *St. Louis Southwestern R. Co. v. Arkansas,* 235 U. S. 350, 369, 370, 59 L. Ed. 265, 274, 275, 35 Sup. Ct. Rep. 99. The act, in its 2d section, requires every distributor of gasoline to pay an annual license tax of $50 for each distributing station or place of business or agency; requires it to be paid in advance; and renders it unlawful to carry on the business without having paid it. Section 8 declares that any person who shall engage or continue in the business of selling gasoline without a license shall be deemed guilty of a misdemeanor, and, upon conviction, be punished by fine or imprisonment, or both. The subject taxed is not in its nature divisible, as in the case of the excise tax. The imposition falls upon the entire business indiscriminately; and so does the prohibition against the further conduct of business without making the payment. By accepted canons of construction, the provisions of the act in respect to this tax are not capable of separation so as to confine them to domestic trade, leaving interstate commerce exempt.... (Citing authorities.)

> No doubt the state might impose a license tax upon the distribution and sale of gasoline in domestic commerce if it did not make its payment a condition of carrying on interstate or foreign commerce. But the state has not done this by any act of legislation. Its executive and administrative officials have disavowed a purpose to exact payment of the license tax for the privilege of carrying on interstate commerce. But the difficulty is that, since plaintiff, so far as appears, necessarily conducts its interstate and domestic commerce in gasoline indiscriminately at the same stations and by the same agencies, the license tax cannot be enforced at all without interfering with interstate commerce unless it be enforced otherwise than as prescribed by the statute, —that is to say, without authority of law. Hence, it cannot be enforced at all."

Whereas we concede that the State of Mississippi has the right of taxation of property having a *situs* in the State, yet a tax cannot be levied for the privilege of transacting such commerce.

In *Helson vs. Commonwealth of Kentucky,* supra, the court held:

> "While a state has power to tax property having a *situs* within its limits, whether employed in interstate commerce or not, it cannot interfere with interstate commerce through the imposition of a tax, which is in effect, a tax for the privilege of transacting such commerce."

To the same effect is the case of *New Jersey Bell Telephone Co. v. State Board of Taxes,* supra, wherein the Court stated:

> "It is elementary that a state may tax property used to carry on interstate commerce. But, as the Constitution vests exclusively in the Congress power to regulate interstate and foreign commerce, a state

may not tax, burden or interfere with such commerce or tax as such gross earnings derived therefrom or impose a license or other burden upon the occupation or the privilege of carrying on such commerce, whatever may be the instrumentalities or means employed to that end."

The mere fact that the cotton, the subject matter of the sale, purchase and shipment by appellees, herein, is interrupted in transit and stored in warehouses pending the accumulation thereof for the purpose of sale and shipment to foreign markets, does not render the character of the business of appellees any the less interstate.

Binderup vs. Pathe Exchange, Inc., 263 U. S. 291.

In the *Binderup* case, supra, *Stafford vs. Wallace*, 258 U. S. 495, was approved in the following language:

"The most recent expression of this court is in *Stafford v. Wallace*, 258 U. S. 495, 516, 66 L. Ed. 735, 741, 23 A. L. R. 229, 42 Sup. Ct. Rep. 397, where, after describing the process by which live stock are transported to the stock yards and thence to the purchasers, it is said: 'Such transactions cannot be separated from the movement to which they contribute, and necessarily take on its character. The commission men are essential in making the sale, without which the flow of the current would be obstructed, and this, whether they are made to packers or dealers. The dealers are essential to the sales to the stock farmers and feeders. The sales are not, in this aspect, merely local transactions. They create a local change of title, it is true, but they do not stop the flow; they merely change the private interests in the subject of the current, not interfering with, but, on the contrary, being indispensable to, its continuity.' The transactions here are essentially the same as those involved in the foregoing cases, substituting the word, 'film' for

the words 'live stock,' or 'cattle,' or 'meat.' Whatever difference exists is of degree and not of character."

In the case at bar, the transactions of appellees are essentially the same as those involved in the *Binderup* case, supra, and as stated in that case, "transactions here are essentially the same as those involved in the foregoing cases, substituting the word 'film' for the words 'live stock,' or 'cattle,' or 'meat,' " and we might add the word "cotton."

The Attorney General apparently concedes that the facts in *Lemke vs. Farmers Grain Co.*, supra, are substantially identical with the facts in the case at bar, "except grain was handled in the former and cotton in the latter."

(Brief on behalf of Appellants, Page 33.)

However, it is undertaken to differentiate the holding in the *Lemke* case, from the contentions made in the instant case, on the ground that a statute of North Dakota involved in that case, "undertook to tax the selling price of grain purchased in North Dakota, even though such grain was sold in another state and in interstate commerce."

We submit, however, that the course of business of the buyers of grain in North Dakota, in purchasing the said grain for shipment into Minneapolis and other markets, constituted an integral part of interstate commerce. And this being true, the State of North Dakota was without authority to impose a privilege or license tax against the buyers of grain under the conditions stated in the opinion of the Court. The essential holding in that case was that such course of business constituted a part of interstate

commerce and, therefore, the nature or extent of the burden undertaken to be imposed is immaterial inasmuch as such attempted imposition would be in violation of the commerce clause of the Constitution.

In respect to the proposition, however, advanced by the Attorney General representing the Appellants, the *Shafer* case, supra, involving a similar statute of North Dakota, enacted after the decision of the *Lemke* case, wholly disposes of this contention, inasmuch as the Court in the *Shafer* case held the act itself unconstitutional and void.

Since it is conceded that the admitted facts of the case at bar are practically identical with the facts in the *Lemke* and *Shafer* cases, supra; admitted both in the brief filed on behalf of Appellants and in the Stipulation of Evidence, it is submitted that the learned Three Judge Court, convened to hear this cause on the application for preliminary injunction and likewise on its merits, was correct in its holding, as reflected by the finding of facts and correct in determining *Section 56, Chapter 88 of the Laws of 1930 of the State of Mississippi,* to be unconstitutional and void, insofar as appellees may be affected thereby, and were eminently correct in perpetually enjoining the Officers of the State of Mississippi from enforcing the act.

Our attention has not been called to any case from this Court contrary to the cases cited in support of the merits. All of the cases relied upon by the appellants deal with matters wholly disassociated from interstate commerce or taxation of interstate commerce, but deal with property having a definite *situs* within the sovereignty undertaking to levy a tax and not with an occupation

essential and necessary in the advancement of interstate commerce.

It is, therefore, respectfully submitted that this cause should be affirmed.

Respectfully submitted,

EDWARD W. SMITH,

SAM C. COOK,

J. L. ROBERSON,

Attorneys for Appellees.

J. W. CUTRER,

Of counsel for Appellees.

CERTIFICATE

This is to certify that I have received a true copy of the above and foregoing brief.

This the 12th day of November, A. D., 1931.

Geo. T. Mitchell,

Attorney General,

By J. A. Lauderdale,

Assistant Attorney General,

Attorneys for Appellants.

APPENDIX

Excerpts From Chapter 88, Laws 1930.

SEC. 56. COTTON BUYERS.—Every person engaged in the business of buying or selling cotton for himself shall pay a privilege tax of one hundred ($100.00) dollars; but, where a cotton buyer from one gin in only one county or buys from the producers in only one municipality, said privilege tax is twenty-five ($25.00) dollars; the license must be issued in his name, and may be paid on or before the first day of September for a full year; only the municipality of his residence can collect a municipal privilege tax of him. Every individual, firm, partnership or corporation engaged in the business of buying or selling cotton shall take out in his or their name a state privilege tax of twenty-five ($25.00) dollars for every employee engaged in their business as buyer or seller, on or before the first day of September; such privilege tax shall authorize the buying or selling cotton by its bearer; and it shall be unlawful for any employee to buy or sell cotton without a privilege tax in his possession, issued in the name of his employer. Such license cannot be issued for less than a year.

If the individual, firm, partnership, or corporation take out a municipal privilege in his or their name for the municipality of the residence of their employee and take out also, the state privilege tax imposed on them above, such employee shall have the authority to buy or sell cotton in any other municipality of the State, without paying any further state or municipal privilege tax.

But the privilege taxes shall not be required of any landlord or other person who received cotton in payment

tion of subjects of commerce, [redacted] receipts derived therefrom, or the occupation of [redacted] ness of carrying it on. . . The state has no such power even in the case of domestic corporations. . . . The statute, as applied to appellant is unconstitutional."

Another case peculiarly analogous to the case at bar is the *Federal Trade Commission* case, supra, wherein the Court stated, as follows:

"Paragraph (c) applies only to mill shipments from one state to another. For the consummation of a transaction involving such a shipment, two contracts are made. The first is for sale and delivery by wholesaler to retailer in the same state. The seller is free to have delivery made from any source within or without the state. The price charged is that fixed by the local association. The other contract is between the wholesaler and manufacturer in different states. There is no contractual relation between the manufacturer and retailer. By the shipment of the paper from a mill outside the state to or for the retailer, the wholesaler's part of the first contract is performed. The question is whether the sale by the wholesaler to the retailer in the same state, is a part of interstate commerce where, subsequently at the instance of a seller and to perform his part of the contracts, the paper is shipped from a mill in another state to or for the retailer. 'Commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business.' *Swift & Co. v. United States*, 196 U. S. 375, 398, 49 L. Ed. 518, 525, 25 Sup. Ct. Rep. 276. And what is or is not interstate commerce is to be determined upon a broad consideration of the substance of the whole transaction. *Dozier v. Alabama*, 218 U. S. 124, 128, 54 L. Ed. 965, 967, 28 L. R. A. (N. S.) 264, 30 Sup. Ct. Rep. 649. Such commerce is not confined to transportation, but comprehends all commercial intercourse between different states and all the component parts of that intercourse. And

it includes the buying and selling of commodities for shipment from one state to another. *Dahnke-Walker Mill Co. vs. Bondurant*, 257 U. S. 282, 290, 66 L. Ed. 239, 243, 42 Sup. Ct. Rep. 106; *Lemke v. Farmers' Grain Company*, 258 U. S. 50, 55, 66 L. Ed. 458, 462, 42 Sup. Ct. Rep. 244. The absence of contractual relation between the manufacturer and retailer does not matter. The sale by the wholesaler to the retailer is the initial step in the business completed by the interstate transportation and delivery of the paper. Presumably the seller has then determined whether his source of supply is a mill within or one without the state. If the contract of sale provided for shipment to the purchaser from a mill outside the state, then undoubtedly it would be an essential part of commerce among the states. *Sonneborn Bros. v. Cureton (Sonneborn Bros. v. Keeling)*, 262 U. S. 506, 515, 67 L. Ed. 1095, 1100, 43 Sup. Ct. Rep. 643. Clearly the absence of such a provision does not affect the substance of the matter when in fact such a shipment was contemplated and made. . . . (Citing authorities) The election of the seller to have the shipment made from a mill outside the state makes the transaction one in commerce among the states. And on these facts the sale by jobber to retailer is a part of that commerce."

Even were we to concede, which we do not, that appellees, as an incident of their interstate business, transact a small and inconsequential intrastate business, nevertheless the privilege tax cannot be upheld, for the reason that it does not appear from the statute that the tax is imposed solely on account of the intrastate business. It, therefore, follows that the tax is inapplicable and void, as placing a burden on interstate commerce.

In *Otis Sprout vs. City of South Bend*, supra, a question identical with the question here presented was brought to the attention of this Court, and in declaring an ordinance

of accounts due him, nor of any merchant who pays a privilege tax on a store and who purchases only from the producer at the place of business of such merchant, nor to cotton mills domiciled in Mississippi where the cotton is purchased for manufacturing purposes.

SEC. 220. TAXPAYER TO APPLY FOR LICENSE. —Every person required to obtain a license for the privilege of engaging in any business for which a privilege tax is required shall make application therefor in writing to the officer who is required to collect the tax; which application shall be made on the form prescribed by the State Auditor of Public Accounts, except as otherwise provided by law, and which shall contain all the information necessary for the officer collecting the tax to properly classify the applicant or to ascertain the amount of tax due. The application shall be sworn to by the taxpayer, or any officer or duly authorized agent of the said taxpayer, which oath may be administered by any officer required by law to collect a privilege tax. The application shall be accompanied by the amount of the privilege tax required by law. Any person who shall wilfully make any false statement in an application for a privilege license shall be guilty of a misdemeanor, and on conviction thereof shall be required to pay as damage double the amount of the difference between the tax paid and that which should have been paid, in addition to the fine and/or imprisonment imposed. The officer taking the application for privilege license shall carefully preserve the same for the use of the grand jury, the courts of the state and/or any duly authorized officer of the State of Mississippi. And any officer who shall refuse or wilfully fail to take or require the application or af-

fidavit herein required shall be guilty of a misdemeanor and subject to the penalties therefor.

SEC. 221. LICENSE TO BE ISSUED.—Upon the receipt of the application herein required and payment of the amount shown thereby to be due for the privilege tax, the officer to whom said application is made shall issue to the applicant taxpayer a privilege license according to such application, and shall date the same as of the first day of the month of its issuance, and such license shall be good, usable and valid for one year after the date thereof, or for such other period as is fixed by law for the privilege and designated in the license. The officer issuing the license shall countersign the same when issued by him, and he shall enter the same in the register prescribed by law therefor. The license issued by collectors as herein provided shall be executed in triplicate, the original shall by the officer be delivered to the licensee, the duplicate forwarded to the State Tax Commission, and the triplicate attached to the application therefor, and preserved by the officer as a public record. If, however, such officer shall before issuing the said license, or at any time thereafter, have reason to believe that the statements of the business contained in the application are incorrect or false in any material particular, the said officer shall notify the applicant by mail wherein the supposed discrepancy lies, and he hereby is empowered to require the applicant to render such other information as will enable him to determine the proper tax due. After making such determination of the proper tax due such officer shall forthwith proceed to collect the same before any license be issued; and if the license shall have been issued under the original application he shall collect the difference between the sum shown to be properly due and the sum paid with the original ap-

plication and issue an additional license therefor which shall expire at the same time as the original. If the additional tax be paid within thirty days after the determination by the officer of the amount due no penalty shall be applied. If the taxpayer shall wilfully fail or refuse to furnish the information requested by such officer he shall be liable for damages as in other cases of payment of an insufficient privilege tax, and may be proceeded against civilly or criminally as otherwise provided herein, and shall suffer the penalties provided herein therefor.

SEC. 225. DAMAGES AND PENALTY FOR FAILURE TO PROCURE LICENSE.—All persons liable for privilege taxes who shall fail to procure the license therefor before beginning the business for which a privilege tax is required by law, or who shall fail to renew, during the month in which it is due, the license on a business for which he has theretofore procured a privilege license, shall in each or either such instance be liable for double the amount of the tax required for such business, and it is hereby made the duty of the collector whose duty it is to collect the tax on such business to collect the said tax penalty, and to endorse across the face of the license issued as a penalty the words: "Collected as Damages"; and they shall account for all such penalties, less commissions, as they are required to account for other privilege taxes. In addition to the hereinabove described penalties the delinquent taxpayer shall be guilty of a misdemeanor and subject to the penalties therefor.

SEC. 240. OFFICER LIABLE FOR TAXES WHICH HE MIGHT BUT FAILS TO COLLECT.—The tax officer required to collect privilege taxes shall require all persons liable to pay a privilege tax to pay

the same; and he shall cause all persons doing business without a privilege license to be prosecuted. The tax officer required to collect privilege taxes shall be liable for wilful failure to collect the same in the same manner as for failure to collect ad valorem taxes, and the liability of such officer shall extend to all cases where he might collect such taxes but negligently fails to do so. The demand required by this section shall not be necessary to render liable the taxpayer to the penalty of doing business without first paying the tax.

SEC. 242. PENALTIES.—Any person violating any of the provisions of this chapter shall be guilty of a misdemeanor and on conviction thereof shall be fined not more than $500.00 or imprisoned in the county jail not exceeding six months, or by both such fine and imprisonment in the discretion of the court within the limitations aforesaid; and such fine and imprisonment shall be in addition to any other penalty imposed by any particular section of this chapter (act). The courts of the county in which the offender resides, or if a company, in which it carries on business, shall have jurisdiction to enforce this section.

IN THE

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OCTOBER TERM 1931

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VS.

J. F. RODGERS, ET. AL., APPELLEES

CERTIFICATE

This is to certify that I have received a true copy of the above and foregoing brief.

This the 12th day of November, A. D. 1931.

GEO. T. MITCHELL,
Attorney General.

J. A. LAUDERDALE,
Assistant Attorney General.
Attorneys for Appellants.

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CERTIFICATE OF COUNSEL

This is to certify that the undersigned has this day mailed postpaid to Geo. T. Mitchell, Attorney General, and J. A. Lauderdale, Assistant Attorney General, Attorneys for the appellants, in the above and foregoing cause, a true copy of the Brief proposed to be filed herein on behalf of the appellees.

Witness the signature of the undersigned on this the 11th day of November, A. D., 1931.

EDWARD W. SMITH,
Of Counsel for Appellees.